

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ZAS INTERNATIONAL	:	CIVIL ACTION
AGRICULTURE, B.V.	:	
	:	
v.	:	
	:	
ZAS USA., INC., INTERNATIONAL	:	
PRODUCE IMPORTS, INC., CLARE	:	
A. KEIJER, DIRK J. KEIJER	:	NO. 98-4073

MEMORANDUM ORDER

Plaintiff is seeking to enforce its rights in a statutory trust created pursuant to the Perishable Agricultural Commodities Act ("PACA"), 7 U.S.C. §§ 499a-499s. With its complaint, plaintiff filed a motion for an ex parte temporary restraining order.¹

In its pleadings, plaintiff sets forth the following factual allegations.

Plaintiff is a foreign corporation with its principal place of business in Holland. It is engaged in the sale of wholesale quantities of perishable agricultural products. Defendants ZAS USA, Inc. and International Produce Imports are Pennsylvania corporations which sell produce imported from Holland to customers in the United States.² The individual

¹ This case was assigned to the Honorable Robert F. Kelly. The application for a TRO was presented to the undersigned as emergency judge since Judge Kelly is unavailable until August 10, 1998.

² Plaintiff ZAS International nowhere explains the corporate relationship between itself and ZAS USA.

defendants, Clare and Dirk Keijer, are principals of both defendant ZAS USA, Inc. and defendant International Produce Imports. All defendants are subject to the provisions of the PACA.

Between May 11, 1998 and July 17, 1998, plaintiff delivered to defendants tomatoes, peppers and eggplants worth \$1,481,590.37. Defendants failed to pay for this produce within the twenty-one days provided by the terms of the parties' contract.

On July 20, 1998 plaintiff's representative, Adrian Verkerk, met with the Keijers to discuss the unpaid bills. The Keijers advised that they were unable to make payments as scheduled because their customers were late making payments to them. Plaintiff subsequently stopped shipping produce to defendants. After deliveries from plaintiff ceased, Dirk Keijer called Mr. Verkerk on July 27, 1998 and threatened to "ruin" plaintiff. Defendants have received no payments in the intervening ten days, and \$1,263,050.87 of the total debt remains unpaid.

Under the PACA, a trust is impressed in favor of suppliers to commission merchants, dealers and brokers of perishable agricultural commodities in the produce supplied and all proceeds derived from the sale of those commodities. See 7 U.S.C. § 499e(c)(2); In re Kornblum & Co., 81 F.3d 280, 285-86

(2d Cir. 1996); Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F.3d 1063, 1067 (2d Cir. 1995); Consumers Produce Co. v. Volante Wholesale Produce, Inc., 16 F.3d 1374, 1378 (3d Cir. 1994); Sanzone-Palmisano Co. v. M. Seaman Enters., Inc., 986 F.2d 1010, 1012 (6th Cir. 1993); In re W.L. Bradley Co., 75 B.R. 505, 509 (E.D. Pa. 1987). This nonsegregated floating trust in effect is a "legal fiction" and consists of "that portion of the debtor's assets which may be traced to the disposition of perishable agricultural commodities." Driscoll Potatoes, Inc. v. N.A. Produce Co., Inc., 765 F. Supp. 174, 178 (D.N.J. 1991). The trust exists for the benefit of all of the debtor's unpaid produce suppliers. In re Kornblum, 81 F.3d at 286; Frio Ice, S.A. v. Sunfruit, Inc., 918 F.2d 154, 159 (11th Cir. 1990). Upon a showing of actual or threatened dissipation, a debtor may be required to escrow trust assets and each beneficiary would be entitled to a pro rata share. Id.

To receive the benefit of the trust protections, an unpaid supplier must provide written notice to the debtor within thirty days after the time agreed to by the parties for payment of the supplier's intent to preserve the benefits of the trust. See 7 U.S.C. § 499e(c)(3); Consumers Produce Co., 16 F.3d at 1378.³ Assuming the trust beneficiary gives proper notice, the

³ If no payment date has been agreed to by the parties, notice must be provided within forty days of receipt of the produce for which trust protection is sought. See 7 U.S.C. § 499e(c)(3); 7 CFR §§ 46.2(aa)(5) & 46.46(g); Weis-Buy Services, Inc. v. Roncone, 1997 WL 323523, *6 (N.D. Ill. June 9, 1997).

PACA provides that a suit may be brought to enforce payment from the trust. See 7 U.S.C. § 499e(c)(4); Consumers Produce Co., 16 F.3d at 1378.

Plaintiff asserts that defendants' failure to pay the outstanding debt "indicates that defendants are failing to maintain sufficient assets in the statutory trust to pay plaintiff and are dissipating trust assets."

Plaintiff seeks an ex parte restraining order directing that "defendants, their customers, agents, officers, subsidiaries, assigns and banking institutions shall not alienate, dissipate, pay over or assign any assets of the defendant corporations or their subsidiaries or related companies except for payment to plaintiff."

PACA does not relieve a trust beneficiary seeking injunctive relief of the obligation to satisfy the usual requirements for obtaining such relief. JSG Trading Corp. v. Tray Wrap, Inc., 917 F.2d 75, 79 (2d Cir. 1990). Plaintiff must demonstrate a likelihood of success on the merits; the probability of irreparable harm if relief is not granted; that granting the relief will not result in greater harm to another party; and, that granting the relief is consistent with the public interest. Bieros v. Nicola, 857 F. Supp. 445, 446 (E.D. Pa. 1994) (citing Frank's GMC Truck Center, Inc. v. G.M.C., 847 F.2d 100, 102 (3d Cir. 1988); Ecri v. McGraw-Hill, Inc., 809 F.2d 223, 226 (3d Cir. 1987)).

On the record presented, it appears that part of the debt owed plaintiff is subject to the PACA trust. On August 5, 1998 plaintiff telefaxed defendants a "Notice of Intent to Preserve Trust Benefits." Information on that document indicates that payments for \$769,234.20 were due on or after July 6, 1998. This amount would be protected by the PACA trust. Payments due more than thirty days before such notice, i.e. before July 5th, are not entitled to PACA trust protection.

Of greater import, plaintiff seeks the requested relief ex parte. An ex parte restraining order is extraordinary and may issue only when it clearly appears "from specific facts shown by affidavit or by the verified complaint that immediate loss and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition." See Fed. R. Civ. P. 65(b).

Plaintiff asserts that "notice will afford defendants an opportunity to dissipate trust assets" and "to pay non-trust debt with trust assets prior to the hearing in order to avoid serious personal liabilities such as criminal liability for failure to pay withholding taxes." There are, however, no specific factual averments to show that defendants are dissipating trust assets or are delinquent in meeting their

federal tax obligations.⁴ The mere failure timely to pay plaintiff does not demonstrate a dissipation or misuse of trust assets. Indeed, plaintiff's Notice of Intention to Preserve Trust Benefits indicates a \$200,000 credit to defendants on July 22, 1998, suggesting that defendants were paying plaintiff as sale proceeds were realized from their customers.

Freezing all of defendants' assets, including their inventories and bank accounts, would almost certainly have a devastating effect on their business operations and result in the loss of perishable food inventories and the accounts receivable they would generate which themselves are PACA trust assets. Absent a specific showing that trust assets are actually threatened with dissipation, the court will not enter an order effectively closing defendants' businesses and actually endangering existing trust assets without any notice to defendants or an opportunity for them to be heard.⁵

⁴ To hypothesize that a party may divert trust funds or use them to satisfy a tax obligation is not to show that such conduct is likely. The court does not suggest that Mr. McCarron, who appears as counsel in a number of reported and unreported PACA cases, routinely relies on boilerplate certifications executed by local counsel. The court notes, however, that in an earlier PACA action in this court in which Mr. McCarron was also co-counsel, the same hypothesis or assumption was offered in verbatim language to justify a TRO without notice or prior opportunity to be heard. See Attorney Certification, Pennsylvania Co-Operative Potato Growers, Inc. v. GPC, Inc., No. 97-4477 (E.D. Pa. filed July 9, 1997).

⁵ The risk is further compounded in that plaintiff seeks such an ex parte TRO without having to post a bond for the reason that defendants owe it a substantial sum. The court cannot predict what defenses the parties may have or the extent of unremediable damages that might be inflicted if an unsecured TRO appeared, after a hearing, to be unjustified.

Plaintiff asserts that it is a "small wholesale exporter" that must pay its own suppliers if it is to operate. The court is somewhat doubtful that a supplier which provides over \$1,481,000 worth of produce to two customers in a ten week period is properly characterized as "small." Nevertheless, plaintiff has a weighty interest in collecting any debt which is outstanding. This, however, does not alone justify freezing all of defendants' assets for the benefit of one creditor with no notice and no opportunity to be heard.⁶

ACCORDINGLY, this day of August, 1998, upon consideration of plaintiff's Motion for a Temporary Restraining Order Without Notice, **IT IS HEREBY ORDERED** that said Motion is **DENIED** without prejudice to renew such motion with specific factual averments demonstrating that defendants are dissipating trust assets or likely will do so if afforded notice, if such can be done in good faith, or to renew such motion upon notice to defendants or otherwise to seek whatever relief from Judge Kelly that he may deem appropriate upon his return next Monday.

BY THE COURT:

JAY C. WALDMAN, J.

⁶ Plaintiff does not even attempt to justify its request to freeze the assets of all of defendants' subsidiaries.